No. 82-5534

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1982

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SUPREME COURT, U.S.

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Supreme Court, U.S.
FILED
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether, in affirming the imposition of the Petitioner's sentence of death, the Florida Supreme Court has adopted such a broad and vague construction of the "hinder ... governmental function" aggravating circumstance as to violate the Eighth and Fourteenth Amendments?

2. Whether Petitioner's death sentence was imposed in the trial court and upheld in the Florida Supreme Court without "the type of individualized consideration of mitigating factors ... required by the Eighth and Fourteenth Amendments in capital cases," Lockett v. Ohio, 438 U.S. 586, 606 (1978)?

3. Whether the Florida Supreme Court's cursory, mechanical "review" of the aggravating and mitigating circumstances in Petitioner's case, in which the Court failed to address or redress substantial Eighth Amendment Violations in the assessment of both aggravating and mitigating circumstances, fulfilled the Court's Eighth-Amendment-based "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Proffitt v. Florida, 428 U.S. 242, 251 (1976)?

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October Term, 1982

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on April 1, 1982, rehearing having been denied July 8, 1982.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Case No. 55,875 is reported as White v. State, 415 So.2d 719 (Fla. 1982) and is set out at pages 6a-8a in the Appendix hereto. Although rehearing was denied by the Supreme Court of Florida, the original opinion was modified on rehearing. Accordingly, the original opinion and the order on rehearing are set out at pages 1a-4a and 5a respectively in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on April 1, 1982, and petitioner's timely motion for rehearing was denied by order dated July 8, 1982. (As noted, the order denying rehearing is set out at page 5a of the Appendix). On August 27, 1982 Justice Powell signed an order extending the time for filing the petition for writ of certiorari to and including October 6, 1982. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case further involves Section 921.141, Florida Statutes (1977), entitled: "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length, the statute is set out in its entirety at pages 9a-10a of the Appendix.

STATEMENT OF THE CASE

On July 11, 1978, William Melvin White (Petitioner) and Richard DiMarino were indicted for the first degree murder of Gracie Mae Crawford (R 1376).[1] Guy Ennis Smith was separately indicted for the same murder.[2] DiMarino was tried first, was convicted of third degree murder, and was sentenced to fifteen years' imprisonment (R 466, 470). Thereafter, pursuant to a plea bargain in which terms of imprisonment for other charges against him would be served concurrently with his sentence for the Crawford murder (R 469-470), DiMarino testified against Petitioner (R 461-544) and Smith (Smith v. State, supra).

The State's evidence in Petitioner's trial, produced primarily through the testimony of Richard DiMarino, revealed that at approximately 2:45 A.M. on June 7, 1978 Gracie Mae Crawford left a bar in Orlando, Florida in the company of five other people, including Richard DiMarino and Guy Ennis Smith (R 181, 184, 186, 192). Ms. Crawford and her companions went to a house in Orlando where the Petitioner had gone earlier in the evening (R 287-290). Upon the group's arrival at this house, DiMarino woke up Petitioner and informed him that Ms. Crawford was there, that she had been talking about liking Black people at the bar, and that as a result she "ought to be trained by a bunch of us." (R 474) Petitioner responded to DiMarino's overture, and DiMarino, Smith, and Petitioner

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[1] The letter "R", followed by the appropriate page numbers, will be used to designate references to the Record on Appeal before the Supreme Court of Florida.

[2] See Smith v. State, 403 So.2d 933 (Fla. 1981)

joined together in beating Ms. Crawford (R 475-477). Thereafter, DiMarino and Petitioner escorted Ms. Crawford to a car (R 480-482), and as they left, according to DiMarino, were given the following instructions by Smith:

> "[Mr. Smith] said he didn't want any witnesses, that he didn't... if we were going to take care of business, not to run a sloppy act."

(R 482) DiMarino understood this as an order "to take Gracie Mae Crawford and to kill her." (R 484)[3] DiMarino then drove Ms. Crawford to a remote area of Orange County where, according to DiMarino, he and Petitioner took Ms. Crawford out of the car, Petitioner stabbed Ms. Crawford in the chest and cut her throat, and he also cut her throat (R 485-486, 490-492).

Since there were no other witnesses to the killing of Ms. Crawford (R 543-544), DiMarino's testimony against Petitioner was critical to the State's case. However, substantial evidence was presented to call into question DiMarino's truthfulness. For example, DiMarino's brother testified that DiMarino admitted to him the day after the homicide that he (DiMarino) had killed Ms. Crawford by stabbing her and cutting her throat (R 605). While also informing his brother that Petitioner was with him when this happened, DiMarino inferred that Petitioner had done nothing because he was so intoxicated (R 613). DiMarino testified that he had been arrested forty or fifty times (T 657-658, 667), and that he could remember being convicted of felonies (rape, robbery, burglary, drug-related offenses, weapons offenses, and resisting arrest) five to ten times (R 674-675). Moreover, DiMarino admitted that he would readily lie when lying served his interest.

> "Q... You are wavering as to whether or not you consider yourself a truthful person, is that a correct statement?
>
> A. [DiMarino] Yes.
>
> Q. And you say you are prone to tell lies, is that a correct statement?
>
> A. Yes.
>
> Q. And you tell the truth only where you feel like it?

[3]This order from Smith had great significance to DiMarino, for Smith was the "regional enforcer" for all the chapters in Florida of the motorcycle club to which Smith and DiMarino belonged (R 483). As regional enforcer, Smith's job was to watch over and make sure if

A. Yes.

Q. And you really don't care whether you tell a truthful statement or a falsification, do you?

A. It depends on the circumstances.

Q. That is what I was getting to. Since you are prone to telling lies, you tell the truth only when it suits your fancy, so to speak?

A. Yes."

(R 505-506) Finally, DiMarino testified that he had reached a bargain with the State that in exchange for his testimony, the sentences of five years for two other charges facing him would be served concurrently with his sentence of fifteen years for his third degree murder conviction for the Crawford homicide (R 469-470).

On the basis of this evidence, the jury convicted Petitioner of first degree murder (R 1582) and recommended that he be sentenced to death (R 827, 1629). The trial judge immediately imposed a death sentence (R 832) and filed findings of fact in support of the sentence eight days later (R 1645-1650).[4] The Supreme Court of Florida sustained the imposition of the sentence of death entirely upon the following cursory description of the penalty proceeding.

> "The jury unanimously recommended the imposition of the death sentence. The trial judge found three aggravating factors and recited his reasons therefor. [Footnote, setting out the findings, omitted.] No testimony was presented of any mitigating circumstances, statutory or nonstatutory, but the trial judge found the mitigating circumstance of no previous felony convictions. We are satisfied that the trial judge weighed the aggravating circumstances against this and any other mitigating circumstances in pronouncing sentence. The findings of the trial judge are supported by the evidence, and his judgment should not be disturbed. In affirming the sentence we are fully aware that DiMarino escaped with a conviction of a third-degree murder. While this is fortunate for him, it does not require the reduction of White's sentence. White was the executioner, and his sentence is warranted."

White v. State, supra, 415 So.2d at 720-721 (Appendix filed herewith, pp. 7a-8a).

Footnote 3 continued:

trouble starts, he intervenes or if he wants something taken care of, he has it taken care of [] [o]r, he takes care of it himself." (Id.)

[4]The judge found the existence of three aggravating circumstances [the murder was committed in the course of committing a kidnapping, Fla. Stat. 921.141 (5)(d); the murder was committed to disrupt or hinder the enforcement of laws.

REASONS FOR GRANTING THE WRIT

I.

IN AFFIRMING THE IMPOSITION OF PETITIONER'S SENTENCE OF DEATH, THE FLORIDA SUPREME COURT HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE "HINDER ... GOVERNMENTAL FUNCTION" AGGRAVATING CIRCUMSTANCE AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

One of the aggravating circumstances provided for the sentencer's consideration in a Florida death penalty case is whether "[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." Fla. Stat. §921.141 (5) (g). The trial judge found this circumstance in Petitioner's case upon an assumption that the motive in killing the victim was "to escape detection and punishment for the crime of aggravated battery" previously committed against her (R 1649). The Florida Supreme Court's approval of the application of this aggravating circumstance in Petitioner's case represents such a broad and vague construction of this circumstance that there is no principled way to distinguish the cases in which it is present from those in which it is not. Accordingly, this aggravating circumstance fails to channel sentencing discretion as required by the Eighth and Fourteenth Amendments.

In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court held that a death penalty statute's aggravating circumstances must be sufficiently limited to provide a principled basis for determining the presence of the circumstances in some cases and their absence in others. Although the state courts remain free to develop their own limiting constructions of aggravating circumstances,[5] the limiting constructions must, as a matter of Eighth Amendment law, be both instructed to sentencing juries, id. at 428-429 and consistently applied from case to case. id. at 429-433. In Godfrey, the Court examined the use of one particular

Footnote 4 continued:

Fla. Stat. §921.141 (5)(g); the murder was especially heinous, atrocious, or cruel, Fla. Stat. §921.141 (5)(h)] and one statutory mitigating circumstance [no prior felony convictions, Fla. Stat. §921.141 (6)(a)].

[5]But presumably, only if such constructions are consistent with each other. See Godfrey v. Georgia, at 431.

aggravating circumstance. It first found the jury instruction concerning this circumstance deficient for failing to limit the circumstance in any meaningful way. Id. at 428-429. The Court then examined the facts of the case and determined that, while the Georgia Supreme Court had developed three "separate but consistent" criteria limiting the application of this circumstance, "[t]he circumstances of this case ... do not satisfy the criteria laid out by the Georgia Supreme Court itself...." Id. at 431, 432. Since the Georgia courts had failed to keep this aggravating circumstance within the bounds determined by the presence of specific facts, the circumstance did not guide discretion, and the death sentence was set aside.

Petitioner submits that the Florida Supreme Court's approval of the application of Florida's "(5)(g)" aggravating circumstance in his case has similarly unleashed sentencing discretion with respect to this circumstance.

As detailed in the Statement of the Case, the charge against Petitioner included his participating in an alleged aggravated battery of the victim prior to her being killed. Shortly after the battery, the victim was transported elsewhere and killed. The evidence indicated that the victim's murder was nothing more than the continuation of the battery, motivated by the same racial and sexual animus which had motivated the battery in the first place. The only evidence possibly giving rise to the trial judge's finding that the victim was killed in order to prevent "detection and punishment for the crime of aggravated battery" (R 1649) was the statement by Guy Smith that "he didnt't want any witnesses, that he didn't ... if we were going to take care of business, not to run a sloppy act." (R 482) On the basis of the Florida Supreme Court's construction of the (5) (g) aggravating circumstance, both prior to and since the decision in Petitioner's case, this evidence does not satisfy the criteria developed by the Florida Supreme Court to limit the application of this circumstance.

Similar to the (b)(7) circumstance in Godfrey, a finding of the (5) (g) circumstance in Florida [that "[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws"] does not

"standing alone, ... impl[y] any inherent restraint on the arbitrary and capricious infliction of the death sentence." Godfrey v. Georgia, supra, 446 U.S. at 428. Any homicide could reasonably be characterized as hindering the enforcement of laws since enforcement of the laws punishing homicide are hindered by the elimination of the person who is generally the best witness: the victim of the homicide. In considering the related (5) (e) aggravatingcircumstance ["[t]he capital felony was committed for the purpose of avoiding or preventing arrest ...."], the Florida Supreme Court has recognized this general applicability of the (5) (e) circumstance to every homicide, and has accordingly held that "the mere fact of death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." Riley v. State, 366 So.2d 19, 22 (Fla. 1979). While the court has not explictly held the same limitation to be applicable to the (5) (g) circumstance, by implication it has, for it has held that either (5) (g) or (5) (e), but not both, can be found when the homicide is committed in order to eliminate witnesses. See Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); White v. State, 403 So.2d 331, 338 (Fla. 1981); Francois v. State, 407 So.2d 885, 891 (Fla. 1981); Ferguson v. State, 417 So.2d 639, 643 (Fla. 1982) [striking one of the two circumstances as an "improper doubling" when both (5) (g) and (5) (e) have been found on the basis of the motive for the homicide being to eliminate a witness]. See Jones v. State, 411 So.2d 165, 168 (Fla. 1982) [upholding (5) (g) when the homicide was committed in order to eliminate witnesses to a robbery].

While the Riley limiting criteria may be equally applicable to (5) (e) and (5) (g) when there are facts tending to show that the homicide was motivated by the elimination of a witness, that limitation is irrelevant to Petitioner's case, for the trial court found that the homicide was not committed to eliminate a witness and thus avoid arrest. Specifically the trial court found

> "e) The murder of Gracie Mae Crawford was not committed for the purpose of avoidig or preventing a lawful arrest or effecting an escape from custody. Although it may be

> argued that the crime was committed for the purpose of avoiding or preventing a lawful arrest by hindering law enforcement officers from discovering the commission of an aggravated battery by Smith and his co-defendants and avoiding punishment and further that the murder was accomplished to eliminate the victim of their crime, the Court has taken the construction of this circumstance most favorable to the defendant and finds that these facts would be more appropriate under circumstance (g) below."

(R 1648-1649). In his findings concerning "circumstance (g)," the trial judge found only the following, at R, 1649:

> "g) the murder of Gracie Mae Crawford was committed to disrupt or hinder the enforcement of laws, i.e., to escape detection and punishment for the crime of aggravated battery. See circumstance (e) above. Circumstance "g" is applicable."

With these findings, the trial judge clearly did not utilize the Riley criteria, for he did not find, as required by Riley, "very strong" proof of "the requisite intent to avoid arrest," Riley v. State, supra, 366 So.2d at 22, by the elimination of a witness.[6] Instead, the trial judge applied an incomprehensibly vague standard which, on the basis of his written findings, could be applied whenever a homicide followed an aggravated battery to to the victim, regardless of the critical limiting factor in Florida of the defendant's motive in committing the subsequent homicide. Cf. Menendez v. State, supra ("This mechanical application of the statute would divert the life-and-death choice away from the nature of the defendant and the deed, as the statute seems to require.")

The only other limiting criterion which the Florida

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[6]Indeed, the trial judge could not have made such a finding, for the only evidence relevant to whether the homicide was committed to eliminate Ms. Crawford as a witness, the statement by Guy Smith, tended to show only that "if [Petitioner and DiMarino] were going to take care of business [i.e. kill Crawford]," they should be sure she died so as not to be a witness against them. (R 482) (emphasis supplied). Nothing in this statement by Smith suggests what Petitioner's motive may have been in killing Ms. Crawford. Moreover, even if it were an accurate reflection of Petitioner's state of mind, it would show at most that if Petitioner were motivated to kill Crawford, he should be sure he killed her. Even in this light, the evidence cannot be said to meet Riley's requirement of very strong proof of the intent to kill in order to eliminate someone as a witness. There was no such proof, and such a motive cannot be assumed. Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979)

Supreme Court has applied to (5) (g) is equally inapplicable to the facts of Petitioner's case. The Court has upheld the finding of this circumstance when the homicide has interfered with an ongoing, active governmental functi'.a. See Tafero v. State 403 So.2d 355, 362 (Fla. 1981); Raulerson v. State, 358 So.2d 826, 833-835 (Fla. 1978); Songer v. State, 322 So.2d 481, 484 (Fla. 1975) [all involving the murder of a police officer engaged in law enforcement duties]. See also Antone v. State, 382 So.2d 1205, 1216 (Fla. 1980) [involving the murder of a potential witness in an ongoing grand jury investigation, to prevent the witness from testifying]. Unquestionably, there was no such ongoing governmental function in which the victim in this case was a participant.

Accordingly, since no limiting instructions were provided to the jury concerning this circumstance (R 822, 1624), and since the circumstances of this case "do not satisfy the criteria laid out by the [Florida] Supreme Court itself," Godfrey v. Georgia, supra, 446 U.S. at 432, in Riley, Menendez, Tafero, Raulerson, Songer, and Antone, supra, Petitioner's death sentence must be vacated, for the sentencing tribunal's reliance on this aggravating circumstance unchanneled, rather than channeled, sentencing discretion.[7]

II

PETITIONER'S DEATH SENTENCE WAS IMPOSED IN THE TRIAL COURT AND UPHELD IN THE FLORIDA SUPREME COURT WITHOUT "THE TYPE OF INDIVIDUALIZED CONSIDERATION OF MITIGATING FACTORS ... REQUIRED BY THE EIGHTH AMENDMENT IN CAPITAL CASES," LOCKETT V. OHIO, 438 U.S. 586, 606 (1978).

In direct violation of Lockett v. Ohio, 438 U.S. 586 (1978), the consideration of mitigating circumstances by both the jury and the judge at Petitioner's trial was limited to the consideration

[7]While Petitioner submits that the principle of Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980), reh. denied and modified, 648 F.2d 446 (5th Cir.1981) requires the vacation of the death sentence and the provision of a new sentencing trial despite the Florida courts' reliance on two other aggravating circumstances, the Court may wish to withhold its final order pending resolution of Stephens before this Court. Zant v. Stephens, ___U.S.___, 102 S.Ct. 1856 (1982).

of only those factors enumerated in the Florida death penalty statue, Section 921.141(6), Florida Statutes (1977). There was evidence of non-statutory mitigating circumstances which could not, as a result, be considered in determining whether Petitioner would live or die. The operation of the Florida death penalty statute in Petitioner's case thus "prevent[ed] the sentencer... from giving independent mitigating weight to aspects of [Petitioner's] character and record and to circumstances of the offense proffered in mitigation" and created "the risk that the death penalty [was] imposed in spite of factors which [called] for a less severe penalty." Lockett v. Ohio, supra, 438 U.S. at 605.

Both the jury's and the judge's consideration of mitigating circumstances was confined to the seven factors enumerated in the Florida death penalty statute [Fla. Stat. 921.141(6)]. The instructions to the jury reasonably conveyed to the jury that they should consider only the seven statutory mitigating circumstances. With respect to aggravating circumstances, the jury was instructed that

> "[t]he aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence...."

(R 821) And as to mitigating circumstances, the jury was instructed that

> "[t]he mitigating circumstances which you may consider, if established by the evidence, are these: [listing only the seven statutory mitigating circumstances]."

(R 823) The parallel syntax in which these instructions were given, coupled with the absence of an instruction that the jury could consider mitigating circumstances not enumerated, could have been interpreted by a "reasonable juror," Sandstrom v. Montana, 442 U.S. 510, 514 (1979), to preclude the consideration of any non-enumerated miti-

gating factor.[8] See Washington v. Watkins, 655 F.2d 1346, 1369-1376 (5th Cir. 1981) (Unit A), cert. denied, ____U.S.____, 102 S.Ct. 2021 (1982).

In addition to limiting the jury's consideration of mitigating circumstances, the judge expressly limited his own consideration to the mitigating circumstances enumerated in the statute. His fact-findings concerned only the presence or absence of the statutory mitigating circumstances (R 1649-1650), and his sentence determination was expressly based only upon a consideration of the statutorily-specified mitigating circumstances.

> "This Court after weighing the aggravating and mitigating circumstances finds that sufficient aggravating circumstances exist as enumerated in Florida Statute 921.141 (5) to require imposition of the death penalty, and that there are insufficient mitigating circumstances, as enumerated in sub-section 6 [of the statute] to outweigh the aggravating circumstances."

(R 1638-1639)

Had the jury's and judge's consideration of mitigating circumstances not been improperly circumscribed, substantial mitigating circumstances, not encompassed within the statutory factors, were in evidence and available for consideration. For example, the disparate sentence of fifteen years' imprisonment received by Richard DiMarino for the murder of Ms. Crawford is a relevant factor in mitigation not covered by the statute that the jury was precluded from considering under the charge. Also mitigating is some doubt about Petitioner's guilt or at least about whether Petitioner was the one who actually committed the killing. DiMarino's version of the actual killing was wholly uncorroborated and, as recognized by the Florida Supreme Court, DiMarino was a "disreputable felon who had been granted favors by the state and who admitted he lied when it would 'suit [his] fancy.'" Smith v. State, supra, 403 So.2d at 935.

[8] This reasonable impression would have been further reinforced by the judge's pre-sentencing-hearing instruction that the hearing was "the part in which we talk about the aggravating and mitigating circumstances...." (R803) (emphasis supplied)

DiMarino thus had every reason to lie and had demonstrated his propensity to do so, giving rise to a very serious concern as to the equities between DiMarino and Petitioner. Moreover, DiMarino's testimony was contradicted by the statement he made to his brother admitting that it was he who did the killing and not Petitioner, who was too drunk to do anything.[9] If in fact DiMarino was the actual killer, the sentencing disparity was especially acute and unjust. And if the jury retained some doubt about whether Petitioner committed the actual killing, a doubt with some justification, such a doubt would be a relevant factor for the jury to consider in mitigation. Cf. Smith v. Balkcom, 660 F.2d 573, 579-582 (5th Cir. (1981); Green v. Georgia, 442 U.S. 95 (1979). These were compelling mitigating factors not allowable for consideration under the jury charge, and undisputably not considered by the judge.

Even though a particular death penalty statute may not on its face preclude the consideration of any mitigating circumstances,[10] the Lockett rule also prevents any application of such a statute in a particular case which does foreclose the consideration of some mitigating evidence. This Court was confronted with this very situation in Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982), in which the trial judge had refused to consider the defendant's violent family history in mitigation, and his refusal had been affirmed and compounded by the Oklahoma Court of Criminal Appeals. Because the courts refused to

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9 Petitioner's state of intoxication, while perhaps not rising to the level of a statutory mitigating circumstance [Fla.Stat. 921.141 (6)(b),(f)], could certainly have been considered in mitigation as well.

10 This Court has implied that the Florida Statute is such a statute, although the statute is ambiguous on its face, but the Court has never been directly presented with this issue. See Proffitt v. Florida, 428 U.S. 242, 250 n. 14 (1976); Lockett v. Ohio, supra, 438 U.S. at 606 & n. 15.

consider relevant mitigating evidence, this Court set aside Eddings' death sentence, for

> "[j]ust as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."

102 S. Ct. at 875-876 (footnote omitted) (emphasis in original). Thus, despite facial statutory compliance with the Eighth Amendment, a statute as applied in a particular case may nontheless violate the Eighth Amendment if all relevant mitigating evidence is not considered, for "Lockett requires the sentencer to listen." 102 S.Ct. at 876 n. 10.

The failure of the jury and the trial judge to consider all relevant mitigating evidence in Petitioner's case, together with the Florida Supreme Court's approval of such a limited consideration of mitigating circumstances, thus fundamentally prejudiced Petitioner's right to an individualized sentence determination.

III.

THE FLORIDA SUPREME COURT'S CURSORY, MECHANICAL "REVIEW" OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES IN PETITIONER'S CASE CONTRAVENED THE COURT'S DUTY TO "[GUARANTEE] THAT THE [AGGRAVATING AND MITIGATING] REASONS PRESENT IN ONE CASE WILL REACH A SIMILAR RESULT TO THAT REACHED UNDER SIMILAR CIRCUMSTANCES IN ANOTHER CASE," PROFFITT V. FLORIDA, 428 U.S. 242, 251 (1976).

The manner of review by the Florida Supreme Court in the instant case did not meet the constitutional requirements for appellate review enunciated in Proffitt v. Florida, 428 U.S. 242 (1976). In upholding the constitu-

tionality of Florida's capital sentencing scheme, this Court relied upon the Florida Supreme Court's "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case." Id. at 251. The appeal procedure was thus seen as an integral part of the task of a capital sentencing scheme: to remove arbitrariness from the imposition of the death sentence. In this Court's view, review by the Florida Supreme Court served as a final check against the arbitrary imposition of death sentences, for it was a system "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" Id. at 253.

This Court believed that the Florida Supreme Court would undertake "responsibly to perform its function of death sentence review with a maximum of rationality and consistency." Id. at 258. And that each case would be "conscientiously reviewed... to assure consistency, fairness, and rationality in the evenhanded operation of state law." Id. at 259-60. Upon this basis, Florida's form of review was thus deemed to be equivalent to the "specific form of review" provided by the Georgia Statute and, accordingly, was of crucial importance to the constitutionality of Florida's capital sentencing scheme. Absent this independent, conscientious, and reliable method of review, the Florida capital sentencing statute would be subject to the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238 (1972).

The Florida Supreme Court's opinion in the present case does not meet the assurances relied upon by the Court in Proffitt. In its singular lack of any analysis, despite serious constitutional questions, the Florida Supreme Court's opinion fails to meet the court's

constitutional responsbility. Instead the court's opinion suggests that it engaged in precisely the "cursory or rubber stamp review" that this Court trusted would not occur. Id. at 259. In Petitioner's case, the Florida Supreme Court merely quoted the aggravating circumstance findings by the trial court and stated that the judgment of the trial court should not be disturbed. The court ignored the finding of a mitigating factor by the trial court and failed wholly to analyze the aggravating factors.[11] One aggravating factor was especially in doubt [sec.(5)(g)] and presents a serious constitutional claim as to its definition and standards for application. Point I, supra. Substantial non-statutory mitigating circumstances were precluded from consideration in determining whether Petitioner would live or die. Point II, supra. Under these circumstances, the Florida Supreme Court has made a mockery of the Court's reliance upon it in Proffitt. Such a practice vitiates every principle governing death penalty cases since Furman and should not be tolerated by this Court.

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11 In the court's original opinion, the trial court's finding of a statutory mitigating circumstance (no prior felony convictions) was totally omitted from its discussion of the trial judge's findings. Appendix, p.3. When the court corrected this aspect of its opinion on rehearing, Appendix pp. 7-8, the correction was merely clerical. The court continued to give no weight to any facts in mitigation.

CONCLUSION

For the reasons expressed herein, the Petitioner, William Melvin White, respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street
West Palm Beach, Florida 33401
(305) 837-2150

BY Richard H. Burr, III
RICHARD H. BURR, III
Assistant Public Defender

Counsel for Petitioner

No. 82-5534

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1982

RECEIVED
OCT 12 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, William Melvin White, who is now imprisoned in the custody of the Florida Department of Corrections, asks to leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto his affidavit in substantially the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY Richard H. Burr, III
RICHARD H. BURR, III
Assistant Public Defender

Counsel for Petitioner

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

A F F I D A V I T

I, WILLIAM MELVIN WHITE, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted of first degree murder and sentenced to death by the Circuit Court for Orange County, Florida. I appealed the judgment of conviction and sentence of death to the Florida Supreme Court and that court affirmed the judgment and death sentence. I am now petitioning for a writ of certiorari to the Supreme Court of the United States.

WILLIAM MELVIN WHITE

Duly witnessed and sworn to before me

this ____ day of _____, 1982.

NOTARY PUBLIC

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RECEIVED
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SUPREME COURT, U.S.

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

A F F I D A V I T

I, RICHARD H. BURR, III, Counsel for Petitioner and a member of the Bar of this Court, depose and say:

1. That the enclosed Petition for Writ of Certiorari was mailed first-class postage prepaid at the Main Branch of the United States Post Office, West Palm Beach, Florida on October 6, 1982.

2. That the petition for writ of certiorari was mailed within the permitted time and was therefore timely filed under Rule 28, Section 2, of the Rules of this Court.

Richard H Burr, III

RICHARD H. BURR, III
Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

SWORN TO and SUBSCRIBED before me this 6th day of October, 1982.

Florestine Watson
NOTARY PUBLIC

Notary Public, State ...
My Commission Expires Sept. 23, 1986
Bonded Thru Troy Fain - Insurance, Inc.

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SUPREME COURT, U.S.

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, RICHARD H. BURR, III, hereby certify that I am a member of the bar of the Supreme Court of the United States, and that I have served copies of the Petition for a Writ of Certiorari together with the Appendix, Motion for Leave to Proceed in Forma Pauperis, and Notice of Appearance, in the above case on counsel for respondent by depositing same in the United States mail, first class postage prepaid, addressed as follows:

Honorable Sharon Lee Stedman
Assistant Attorney General
111 Georgia Avenue
Elisha Newton Dimick Building
West Palm Beach, Florida 33401

All parties required to be served have been served. Done this 6th day of October, 1982.

Richard H. Burr, III

RICHARD H. BURR, III
Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

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October Term, 1982

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

NOTICE OF APPEARANCE

The Clerk will enter my appearance as Counsel for WILLIAM MELVIN WHITE who in this Court is Petitioner.

I certify that I have been previously admitted to, and am a member in good standing of, the Bar of the Supreme Court of the United States.

Richard H. Burr, III

RICHARD H. BURR, III
Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401

The person to be notified on behalf of Petitioner in this case is the above counsel.

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SUPREME COURT, U.S.

NO. 82-5534

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Supreme Court, U.S.
FILED
OCT 6 1982
Alexander L. Stevas, Clerk

WILLIAM MELVIN WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RICHARD L. JORANDBY
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15th Judicial Circuit of Florida
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West Palm Beach, Florida 33401
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CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR, III
Assistant Public Defender

Counsel for Petitioner

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Supreme Court of Florida

No. 55,875

WILLIAM MELVIN WHITE, Appellant,

v.

STATE OF FLORIDA, Appellee.

[April 1, 1982]

Per Curiam.

William Melvin White appeals his conviction of first-degree murder and sentence of death. We affirm.

White was a member of a Kentucky chapter of the Outlaws, a motorcycle gang, but was visiting the Orlando chapter. A group of the Outlaws, accompanied by some girl friends, visited an Orlando nightclub where they met Gracie Mae Crawford. Gracie Mae accompanied some of the Outlaws back to their Orlando clubhouse. Soon after returning to the clubhouse, White retired to a bedroom with his girl friend. Sometime thereafter White was called by Richard DiMarino who stated that Crawford liked blacks and that they had to teach her a lesson. White dressed and went into the kitchen area where he joined DiMarino and Guy Lloyd Smith in severely beating Crawford. Whether DiMarino or White led the assault is unclear, but one witness testified of White's hitting Crawford with his fist and knocking her to the floor. After the beating, DiMarino and White placed Crawford in the middle of the front seat of White's girl friend's car. White started driving but along the way stopped the car and DiMarino drove the car to the end of a deserted road. The victim, White and DiMarino had done a lot of drinking that evening, but White's girl friend

testified that he knew what he was doing.[1] After they stopped the car, DiMarino and White pulled Crawford from the car, passed her over a barbed wire fence, and laid her on the ground. White then straddled her, took out his knife, stabbed her fourteen times and slit her throat. He handed the knife to DiMarino who also cut her throat. Crawford died as a result of the wounds inflicted upon her.

While leaving the area White and DiMarino ran out of gas at the Seaworld parking lot and were later identified by Seaworld security guards who had given them gas. White and DiMarino went back and picked up the body of the deceased and thereafter discarded it at a different place. The body was discovered that afternoon.

On appeal White raises eight issues going to the trial and his conviction and also raises the propriety of the death penalty.[1] Each of the eight points concerns claims of trial error. After reviewing the record, we find no merit in any of the points raised and do not feel that any warrant or require specific discussion. Viewed in the context in which they were made, the prosecutor's comments were proper and reasonable and did not trespass upon the defendant's rights to a fair trial. Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880 (1962). The judge's handling of the jury and the witnesses was proper, and there was no introduction of improper evidence. We have reviewed the evidence for its sufficiency and have searched the record for other error. We find the evidence sufficient to convict and can discern no reversible error.

The jury unanimously recommended the imposition of the

---

[1] The first six issues deal with comments by the prosecutor in his closing argument: (1) threats to the life of the key prosecution witness and his family; (2) alleged solicitation of a conviction because the codefendant had been convicted; (3) an alleged comment on the defendant's failure to testify; (4) the key prosecution witness' ability to pass or fail a polygraph test; (5) errors for stating passages from the Bible; (6) an alleged comment on the state's belief in the defendant's guilt. The last three issues concern the trial court's instructions to the key prosecution witness, alleged errors in the collective voir dire, and alleged error in the sentencing.

death sentence. The trial judge found three aggravating factors and recited his reasons therefor.[2] No testimony was presented of any mitigating circumstances, statutory or nonstatutory. The findings of the trial judge are supported by the evidence, and his judgment should not be disturbed. In affirming the sentence we are fully aware that DiMarino escaped with a conviction of a third-degree murder. While this is fortunate for him, it does not require the reduction of White's sentence. White was the executioner, and his sentence is warranted.

It is so ordered.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

---

[2] The trial judge found that:

> a) The murder of Gracie Mae Crawford was committed while the Defendant was engaged in the commission of a kidnapping. The evidence is clear that Gracie Mae Crawford was severely beaten to the extent of causing brain damage. Further, she was quite intoxicated. She was "helped" from the kitchen to the car by Richard DiMarino. She asked to be taken home. She was placed between DiMarino and White and, against her will, forcefully and secretly confined for the purpose of murdering her in a remote area. Circumstance "a" is applicable.
>
> * * * *
>
> g) The murder of Gracie Mae Crawford was committed to disrupt or hinder the enforcement of laws, i.e., to escape detection and punishment for the crime of aggravated battery. See circumstance (a) above. Circumstance "g" is applicable.
>
> h) The murder was especially heinous, wicked, and cruel. The victim, beaten and intoxicated, was quite helpless and unable to defend herself from the Defendant's conscienceless, willful, purposeful, and savage attack. The Defendant repeatedly struck the victim in the chest and face with a knife causing fourteen separate puncture wounds, at least three of which would have alone been fatal. To insure the death of his victim, the Defendant then slit her throat. She died as a result of planned, methodical, cruel, wanton, malicious, atrocious, conscienceless, pitiless crime unnecessarily tortuous to the victim. Without further elaboration, circumstance "h" is applicable.

An Appeal from the Circuit Court in and for Orange County,

Frederick Pfeiffer, Judge - Case No. CR78-1340 Div. "12"

Richard L. Jorandby, Public Defender; Craig S. Barnard, Chief Assistant Public Defender; and Richard B. Greene, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida,

for Appellant

Jim Smith, Attorney General; and Joy B. Shearer, Mark Horn and Sharon Lee Stedman, Assistant Attorneys General, West Palm Beach, Florida,

for Appellee

Supreme Court of Florida

THURSDAY, JULY 8, 1982

WILLIAM MELVIN WHITE, Appellant,	)	
vs.	)	CASE NO. 55,875
STATE OF FLORIDA, Appellee.	)	Circuit Court Case No. CR78-1840 Div. "12" (Orange County)

The opinion filed April 1, 1982, has been revised on page three. The motion for rehearing, having been considered in light of the revised opinion, is hereby denied.

The Application for Stay of Judgment and Mandate filed by attorney for appellant is granted and the proceedings in this Court and the Ninth Judicial Circuit in and for Orange County, Florida, are hereby stayed to and including August 9, 1982, to allow appellant to seek review in the United States Supreme Court and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: Janie L. Bentley
Deputy Clerk

JB

cc: Hon. William D. Gorman, Clerk
Hon. Frederick T. Pfeiffer, Judge
Mr. Craig S. Barnard, Chief Assistant Public Defender
Ms. Sharon Lee Stedman, Assistant Attorney General

William Melvin WHITE, Appellant,

v.

STATE of Florida, Appellee.

No. 55875

Supreme Court of Florida

April 1, 1982

Rehearing Denied July 8, 1982

Defendant was convicted before the Circuit Court, Orange County, Frederick Pfeiffer, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court held that: (1) prosecutor's comments were proper and reasonable, (2) judge's handling of jury and witnesses was proper, (3) evidence was sufficient to convict, (4) findings of aggravating factors were supported by evidence, and (5) fact that accomplice escaped with conviction of third-degree murder did not require reduction of defendant's sentence.

Affirmed.

1. Criminal Law ⇐713

Prosecutor's closing argument comments in first-degree murder prosecution were proper and reasonable and did not trespass upon defendant's rights to fair trial.

2. Criminal Law ⇐338(1), 653(9)

Trial judge's handling of jury and witnesses in first-degree murder prosecution was proper and there was no introduction of improper evidence.

3. Homicide ⇐253(1)

Evidence in first-degree murder prosecution was sufficient to convict.

4. Homicide ⇐354

Trial judge's findings of aggravating factors in first-degree murder prosecution were supported by evidence and would not be disturbed.

5. Homicide ⇐354

Fact that defendant's accomplice was convicted of third-degree murder did not require reduction of death sentence imposed on defendant for first-degree murder.

Richard L. Jorandby, Public Defender, Craig S. Barnard, Chief Asst. Public Defender, and Richard B. Greene, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., and Jay B. Shearer, Mark Hicks and Sharon Lee Stedman, Asst. Attys. Gen., West Palm Beach, for appellee.

PER CURIAM.

William Melvin White appeals his conviction of first-degree murder and sentence of death. We affirm.

White was a member of a Kentucky chapter of the Outlaws, a motorcycle gang, but was visiting the Orlando chapter. A group of the Outlaws, accompanied by some girl friends, visited an Orlando nightclub where they met Gracie Mae Crawford. Gracie Mae accompanied some of the Outlaws back to their Orlando clubhouse. Soon after returning to the clubhouse, White retired to a bedroom with his girl friend. Sometime thereafter White was called by Richard DiMarino who stated that Crawford liked Marks and that they had to teach her a lesson. White dressed and went into the outdoor area where he joined DiMarino and Gary Lynn Smith in severely beating Crawford. Whether DiMarino or White hit the fatal punches, but one witness testified of White's hitting Crawford with his fist and kicking her to the floor. After the beating, DiMarino and White placed Crawford in the middle of the front seat of White's girl friend's car. White started driving but along the way stopped the car and DiMarino drove the car to the end of a deserted road. (The victim, White and DiMarino had done a lot of drinking that evening, but White's girl friend testified that he knew what he was doing.) After they stopped the car, DiMarino and White

pulled Crawford from the car, pass[ed] her over a barbed wire fence, and [let] her to the ground. White then straddled her, took out his knife, stabbed her fourteen times and cut her throat. He handed the knife to DiMarino who also cut her throat. Crawford died as a result of the wounds inflicted upon her.

While leaving the area White and DiMarino ran out of gas at the Sunshine Parkway lot and were later identified by Sunshine security guards who had given them gas. White and DiMarino went back and picked up the body of the deceased and thereafter discarded it at a different place. The body was discovered that afternoon.

[1–3] On appeal White raises eight issues going to the trial and the conviction and also raises the propriety of the death penalty.[1] Each of the eight points raises the claims of trial error. After reviewing the record, we find no merit in any of the points raised and do not feel that any were

1. The first six issues deal with restraints by the prosecutor in his closing argument, (2) Threats to the life of the key prosecution witness and his family, (2) alleged substitution of a conviction because the co-defendant had been convicted, (3) an alleged comment on the defendant's failure to testify, (4) the key prosecution witness' ability to pass or fail a polygraph test, (5) errors for which prejudice from the whole, (6) an alleged comment on the state's belief in the defendant's guilt. The last three issues concern the trial court's instructions to the key prosecution witness, alleged errors in the collective sum due, and alleged error in the sentencing.

2. The trial judge found that

> d) The murder of Grace Mae Crawford was committed while the Defendant was engaged in the commission of a kidnapping. The evidence is clear that Grace Mae Crawford was severely beaten to the extent of causing brain damage. Further, she was quite intoxicated. She was "helped" from the kitchen to the car by Richard DiMarino. She asked to be taken home. She was placed between DiMarino and White and against her will, forcefully and wrongfully confined for the purpose of murdering her in a remote area. Circumstance "d" is applicable.
>
> e) The murder of Grace Mae Crawford was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. Although it may be argued that the crime was committed for the purpose of avoiding or preventing a lawful arrest, [illegible] the circumstances under which they were made, the [illegible] were [illegible] upon the defendant's right to [illegible] Spinkellink v. [illegible], cert. denied, [illegible] 1978, 1 L.Ed.2d 283 (1978). The jury's finding of the jury [illegible] was proper, and there [illegible] to support evidence. We have reviewed the evidence for the [illegible] and have concluded the record for [illegible]. We find the evidence sufficient to support [illegible] to prove the crime.

[4, 5] The jury unanimously recommended the imposition of the death penalty. The trial judge found three aggravating factors and refused to consider [illegible] for.[2] No testimony was presented of any mitigating circumstances [illegible] statutory, but the trial judge found the

> purpose of avoiding or preventing a lawful arrest. In making [illegible] officers [illegible] concerning the commission of an aggravated battery by Smith and his co-defendants and [illegible] procedures and further that the murder was accomplished to eliminate the victim as their crime. The Court has taken the consideration of this circumstance most favorable to the defendant and finds that the fact would be more appropriate under circumstance [illegible].
>
> * * * * * *
>
> e) The murder of Grace Mae Crawford was committed to disrupt or hinder the enforcement of laws or to escape detention and punishment for the crime of aggravated battery. See circumstance (e) above. Circumstance "e" is applicable.
>
> f) The murder was especially heinous, wicked, and cruel. The victim, beaten and intoxicated, was quite helpless and unable to defend herself from the Defendant's coercive actions, willful purposeful, and savage attack. The Defendant repeatedly struck the victim on the chest and face with a knife causing fourteen separate puncture wounds, at least three of which would have alone been fatal. To insure the death of his victim, the Defendant then slashed her throat. She died as a result of planned, methodical, cruel, wanton, malicious, atrocious, conscienceless, pitiless crime unnecessarily tortuous to the victim. Without further elaboration, circumstance "h" is applicable.

mitigating circumstance of no prior felony convictions. We are satisfied that the trial judge weighed the aggravating circumstances against this and any other mitigating circumstances in pronouncing sentence. The findings of the trial court are supported by the evidence, and the judgment should not be disturbed. In affirming the sentence we are fully aware that Mr. White is charged with a conviction of first degree murder. While this is for him, it does not require the White's sentence. White was the tioner, and his sentence is

It is so ordered.

SUNDBERG, J., and ARIAN, OVERTON, WIDEMAN, DONALD, JJ., concur.

CHAPTER 921

SENTENCE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If through impossibility or inability the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special jury as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statement. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—[illegible]

Office - Supreme Court, U.S.
FILED
NOV 8 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 82-5534

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM MELVIN WHITE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
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QUESTIONS PRESENTED

POINT I

WHETHER IN AFFIRMING THE IMPOSITION OF PETITIONER'S SENTENCE OF DEATH, THE FLORIDA SUPREME COURT ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE "HINDER...GOVERNMENTAL FUNCTION" AGGRAVATING CIRCUMSTANCE AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS?

POINT II

WHETHER THE PETITIONER'S DEATH SENTENCE WAS IMPOSED IN THE TRIAL COURT AND UPHELD IN THE FLORIDA SUPREME COURT WITHOUT "THE TYPE OF INDIVIDUALIZED CONSIDERATION OF MITIGATING FACTORS...REQUIRED BY THE EIGHTH AMENDMENT IN CAPITAL CASES," LOCKETT V. OHIO, 438 U.S. 586, 606 (1978)?

POINT III

WHETHER THE FLORIDA SUPREME COURT'S REVIEW OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES IN PETITIONER'S CASE CONTRAVENED THE COURT'S DUTY TO "[GUARANTEE] THAT THE [AGGRAVATING AND MITIGATING] REASONS PRESENT IN ONE CASE WILL REACH A SIMILAR RESULT TO THAT REACHED UNDER SIMILAR CIRCUMSTANCES IN ANOTHER CASE," PROFFITT V. FLORIDA, 428 U.S. 242, 251 (1976)?

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Statement of the Facts.

ARGUMENT

POINT I

IN AFFIRMING THE IMPOSITION OF PETITIONER'S SENTENCE OF DEATH, THE FLORIDA SUPREME COURT DID NOT ADOPT SUCH A BROAD AND VAGUE CONSTRUCTION OF THE "HINDER...GOVERNMENTAL FUNCTION" AGGRAVATING CIRCUMSTANCE AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla.), cert. denied, ___U.S.___, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), the Florida Supreme Court described its function in reviewing a death sentence. First, the Supreme Court reviews each sentence for procedural regularity.

> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. Proffitt v. Florida, 428 U.S. 242 [96 S.Ct. 2960, 49 L.Ed.2d 913](1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 [94 S.Ct. 1951, 40 L.Ed.2d 295](1974). In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment. See Malloy v. State, 382 So.2d 1190 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976).
>
> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not

> unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

In Petitioner's case, the trial Judge did not find the contested aggravated circumstance upon an assumption, as asserted by Petitioner, but, rather, upon strong proof of the requisite intent to hinder the enforcement of laws. The proof of the requisite intent was through testimony of eyewitness and co-defendant DiMarino. DiMarino testified that Guy Smith, another co-defendant, said he did not want any witnesses [to the aggravated battery perpetrated on the victim], that if DiMarino and Petitioner were going to take care of business, not to run a sloppy act (R 482). DiMarino further testified that this meant that he and Appellant were to take the victim, Gracie Maw Crawford, and kill her (R 484). The evidence was, therefore, strong and convincing to show that the dominant motive for murder was the elimination of a witness who, in fact, was the victim of an aggravated battery. Riley v. State, 366 So.2d 19 (Fla. 1978). Obviously, the intent of Petitioner and the other two convicted murderers, Smith and DiMarino, was to avoid detection and possible prosecution for committing an aggravated battery which would hinder the enforcement of laws. The mere fact of death did not invoke this circumstance, contrary to the Petitioner's allegation.

Further, what is forbidden under Florida law is doubling-up of aggravating circumstances based on the same aspect of a defendant's criminal conduct. Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). See also, Hargrave v. State, 366 So.2d 1 (Fla. 1978). A trial judge may not use the same incidents as a basis for finding that the capital felony was committed for the purpose of hindering the lawful exercise or enforcement of the criminal laws of the state, section 921.141(5)(g), Florida Statutes (1981), and also for a finding

that the capital felony was committed to avoid or prevent a lawful arrest, section 921.141(5)(e), Florida Statutes (1977). White v. State, 403 So.2d 331 (Fla. 1981). See also, Francois v. State, 407 So.2d 885 (Fla. 1982). In the well-reasoned order imposing the death penalty, the trial judge was well aware of Florida law as the court felt that, under the circumstances of the Petitioner's individual case, the incidents were more appropriate to a finding under section 921.141(5)(g), Florida Statutes (1977). The reasoning contained in said order supports the Respondent's position that the statute is not vague and provides a meaningful basis for distinguishing the few cases which the death penalty is imposed from the many cases in which it is not. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

The Respondent submits that no limiting instructions, other than the statute itself, is necessary as the aggravating circumstance at issue is already limited in a meaningful way. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1981). In Godfrey, the aggravating circumstance complained of read in its entirety that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." 446 U.S. at 422. The jury sentenced Godfrey to death solely on the basis of that one aggravating circumstance. But the jury only found beyond a reasonable doubt "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." 446 U.S. at 426. Since the jury's finding did not encompass a finding as to "depravity of mind," "torture," or "an aggravated battery to the victim," and the trial judge did not give any limiting instructions as to the meaning of the terms "outrageously or wantonly vile, horrible, and inhuman," this Honorable Court reversed Godfrey's death sentences. This Court reasoned that in light of the facts and circumstances of the murders that Godfrey was convicted of, the Georgia Supreme Court did not apply a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that [they] involved...depravity of mind...." 446 U.S.

at 432. Godfrey, therefore, is simply not applicable to the instant case.

POINT II

THE PETITIONER'S DEATH SENTENCE WAS NOT IMPOSED IN THE TRIAL COURT AND UPHELD IN THE FLORIDA SUPREME COURT WITHOUT "THE TYPE OF INDIVIDUALIZED CONSIDERATION OF MITIGATING FACTORS...REQUIRED BY THE EIGHTH AMENDMENT IN CAPITAL CASES," LOCKETT V. OHIO, 438 U.S. 586, 606 (1978).

The trial court specifically limited the aggravating circumstances that the jury could consider to those enumerated in section 921.141(5), Florida Statutes (1977). The mitigating circumstances were not so limited (R 823). At the sentencing hearing, defense counsel emphasized the fact that DiMarino received a fifteen year prison term for his involvement (R 817). Defense counsel was not limited to arguing only the enumerated mitigating circumstance found in section 921.141(6), Florida Statutes (1977). Therefore, the Petitioner's assertion that a "reasonable juror" (emphasis added) could infer that he was precluded from considering any non-enumerated mitigating factor is totally without merit. Eddings v. Oklahoma, ___U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)(Imposition of a sentence of death done without the type of individualized consideration of mitigating factors where the trial court refused to consider in mitigation, as a matter of law, evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance)(emphasis added).

The jury in the instant case not only recommended the death sentence but did so unanimously (A-1). Therefore, the Respondent submits that the jury was possessed of no doubt but that the Petitioner committed the actual especially heinous, atrocious, and cruel murder of Gracie Mae Crawford and that he was deserving of the ultimate penalty-death. The trial court followed the law and imposed the sentence of death after an individualized sentence determination. For the trial court to have done otherwise would have contravened the

requirement that death sentences be imposed to ensure relative proportionality among death sentences which have been approved statewide.

POINT III

THE FLORIDA SUPREME COURT'S REVIEW OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES IN PETITIONER'S CASE DID NOT CONTRAVENE THE COURT'S DUTY TO "[GUARANTEE] THAT THE [AGGRAVATING AND MITIGATING] REASONS PRESENT IN ONE CASE WILL REACH A SIMILAR RESULT TO THAT REACHED UNDER SIMILAR CIRCUMSTANCES IN ANOTHER CASE," PROFFITT V. FLORIDA, 428 U.S. 242, 251 (1976).

The Respondent respectfully submits that the Florida Supreme Court gave all the consideration that the Petitioner's case warranted. The points raised on appeal were well briefed by both sides, oral argument was had before the supreme court, and the Florida Supreme Court correctly held that none of the points raised merited discussion.

The Supreme Court's function on evidentiary matters in reviewing death sentences is solely to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. Brown v. Wainwright, supra. The Florida Supreme Court found that the findings of the trial judge were supported by the evidence. The trial court properly performed its duty under the law, the Supreme Court properly performed its function in reviewing death sentences, and the Petitioner cannot be heard to complain. The Petitioner's trial was well tried, he had the benefit of competent trial counsel, none of his constitutional rights were violated as so found by the Florida Supreme Court, the jury unanimously recommended the penalty of death, and the trial court issued a well-reasoned and legally supportable order imposing the death sentence. The trial court followed the mandates of Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), by setting forth in writing its factfindings that sufficient statutory aggravating circum-

stances existed and were not outweighed by statutory mitigating circumstances (A 2-10).

The Petitioner's allegation that the Florida Supreme Court failed to undertake responsibility to perform its function of death sentence review with a maximum of rationality and consistency because of the length of its opinion is frivolous. The Florida Supreme Court gave the Petitioner's case what was warranted under the individualized circumstances of his cause. The mere length of an opinion alone cannot be said to be in violation of Proffitt v. Florida, supra. The Petitioner's sentence of death is warranted by his own actions in the brutal murder that he committed and is consistent with other sentences imposed in similar circumstances. The Petitioner's death was not wantonly or freakishly imposed and should not be disturbed by this Honorable Court.

CONCLUSION

WHEREFORE, the Respondent respectfully requests that this Honorable Court deny the Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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Attorney General

Bob Bogen /sls

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Assistant Attorney General

Sharon Lee Stedman

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail/courier, to Richard H. Burr, III, Esquire, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 5th day of November, 1982.

Sharon Lee Steaman
Of Counsel

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

INDICTMENT NO. CR78-1840

STATE OF FLORIDA,

Plaintiff,

vs.

WILLIAM MELVIN WHITE,

Defendant.

_____/

FILED IN OPEN COURT
THIS 21 DAY OF December, 19 78
R. P. Kirkland, Clerk
BY _____ D.C.

VERDICT

A majority of the jury advise and recommend to the Court that it impose a sentence of the death penalty upon the defendant, WILLIAM MELVIN WHTIE.

_____ Number of jurors who recommend life imprisonment.

12 Number of juro·s who recommend the death penalty.

_____
JURY FOREMAN

DATED AT ORLANDO, ORANGE COUNTY, FLORIDA

THIS 21 day of December, 1978.

A I

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. CR78-1840

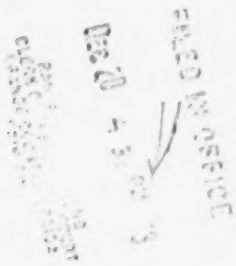
STATE OF FLORIDA,

Plaintiff,

vs.

WILLIAM MELVIN WHITE,

Defendant.



SENTENCE

This Court has weighed and considered the total evidence received in this cause and the advisory sentence returned by the jury. This date I am also filing my written findings of fact as required by law.

In short, this was a particularly brutal, atrocious and cruel murder. Gracie Mae Crawford was beaten about the face to the extent that she received, according to Dr. Hegert, a sub-dural hematoma. Then highly intoxicated so her will to resist was gone, she was forceably kidnapped even though asking to go home to her children. You and your accomplice coldly and cooly looked for a lonly spot, took her over a five foot fence and as she lay on the ground, stabbed her fourteen (14) times followed by a ceremonial slitting of her throat. The unfeeling, indifferent, cold blooded ease in which all of this was done could not have been done by one unaccustomed or inexperienced with cruel death.

The law of this state permits a sentence of death for murder in the first degree and the facts of this case require it.

I (concur in) (~~hereby overrule~~) the recommendation of the jury in this case.

This Court, after weighing the aggravating and mitigating circumstances finds that sufficient aggravating circumstances exist as enumerated in Florida Statute 921.141 (5) to require imposition of the death penalty, and that there are insufficient mitigating circumstances,

as enumbrated in sub section (6) to outweigh the aggravating circumstances.

Do you, or anyone on your behalf, have any legal cause to show why sentence should not be pronounced?

No legal cause having been shown which would preclude prenouncment of sentence, does anyone wish to offer any testimony or make any statement relevent to the sentence to be imposed?

You, William M. White,having previously been adjudicated guilty of murder in the first degree for the killing of Gracie Mae Crawford, as charged in indictment No. CR78-1840, now,

It is the sentence of the law and the judgment of this Court that you, William M. White for the murder of Gracie Mae Crawford, be committed to the custody of the Department of Corrections in the State of Florida, and, at a time to be fixed by the Governor of the State of Florida, you shall be put to death by means of electrocution as provided by Florida Statute 922.01.

May God have mercy on your soul.

The Sheriff of Orange County, Florida, shall deliver you to the Department of Corrections at a place provided for your reception. The Sheriff shall also deliver a copy of this judgment and sentence to the Department of Corrections.

I now advise you that it is your right to appeal this judgment and sentence and you have thirty (30) days from today within which to file your appeal with the Florida Supreme Court.

Failure on your part to appeal within the thirty (30) day period shall constitute a waiver of your right to appeal.

You are entitled to assistance of counsel in taking your appeal and upon your request and a showing that you are unable to afford a lawyer, which instrument I ask you now to sign, one will be provided at the expense of the State of Florida upon appointment by this Court.

Please sign your written acknowledgment of your rights to appeal.

The Defendant,William M. White, is remanded to the custody of the Sheriff of Orange County, Florida, who shall deliver him to the STate Prison according to Florida Statute 922.111.

DONE and ORDERED in Chambers at Orlando, Orange County, Florida this 21st day of December, 1978.

CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. CR78-1840

STATE OF FLORIDA,

Plaintiff,

vs.

WILLIAM MELVIN WHITE,
aka "SNIVELHEAD",

Defendant.

_____/

FILED IN OFFICE
DEC 27 1978
CLERK CIRCUIT COURT
ORANGE COUNTY, FLA.
BY

FINDING OF FACT

Based upon the evidence presented, the Court finds:

The Defendant, William Melvin White, also known as "Snivelhead", is a 33 year old, single, Caucasian male who was born on May 23, 1945. He is approximately 5'7" tall, weighs approximately 130 pounds, and has extensive tatoos on both arms. He is a member of a Kentucky chapter of the Outlaw Motorcycle Club.

The victim, Gracie Mae Crawford, was a 28 year old Caucasian female who had three children. She was 5'½" tall and weighed 110 pounds. The medical examiner's testimony showed that, at the time of her death, between 3:00 and 4:00 A.M. on June 6, 1978, her blood alcohol showed .32, indicating that she was quite intoxicated.

During the evening hours of June 5, 1978, Gracie Mae Crawford and her date, Leslie McBride, went to the Inferno Lounge, a night club located on South Orange Blossom Trail in Orange County. That evening, Mr. McBride left the Inferno Lounge without his date and went home. Later that evening, several members of the Outlaw Motorcycle Club were seen talking to the victim, Gracie Mae Crawford, at the Inferno Lounge.

Gracie Mae Crawford was found murdered the following day. Mr. McBride identified her body.

After midnight on June 6, 1978, deputies from the Orange County Sheriff's Office responded to a disturbance caused by members of the

Outlaw Motorcycle Cl[illegible] at the Inferno Lounge. [illegible] deputies took a knife from the defendant, William Melvin White, who had been causing a disturbance and asked him to leave. The testimony showed that White had been drinking, but that he knew what he was doing. The deputies gave the knife to his girlfriend, Sami Renee Nestle. The Defendant, White, and Ms. Nestle left in her car, a 1975 blue AMC Hornet, Tag #DEJ-436. One of the deputies observed Ms. Nestle give the knife back to the Defendant, White.

Later, as the Inferno Lounge was closing at 2:00 A.M., there was a second incident which was investigated by the Orange County Sheriff's Office, which again, involved members of the Outlaw Motorcycle Club. During the second incident, the victim, Mrs. Crawford, left the premises in the company of several Outlaw members including a co-Defendant, Richard C. "Dino" Dimarino, a co-Defendant, Guy Ennis "Wolf" Smith, Mike "Gorilla" Kerse, John "Patch" Dimarino, and Linda Altizer.

The evidence showed that the victim was taken to 2309 Surfside Way, Orange County, Florida, the home of Joe "Wildman" Watts and Julie Watts which also served as an Outlaw clubhouse. The testimony showed that at approximately 2:45 to 3:00 A.M. on June 6, 1978, shortly after her arriv at Surfside Way, the victim, Gracie Mae Crawford was severely beaten by three men, the Defendant, William Melvin "Snivelhead" White, Guy Ennis "Wolf" Smith and Richard C. "Dino" Dimarino, all members of the Outlaw Motorcycle Club.

The beating continued over a period of 15 to 20 minutes during which time the victim was alternately screaming, crying, calling for help, and asking to be taken home. Her face was bloodied at least twice. She was forceably washed off in the sink twice by the co-Defendant, Smith She was beaten in the face, knocked to the ground, and kicked in the stomach, while on the ground, pulled up by the hair, and again struck by the Defendant, White. The victim's blood was on the sink, the floor and the walls of the kitchen and it required 30 minutes to clean up the blood by one of the other girls. However, the officers were still able to find the victim's blood at multiple locations in the kitchen during the execution of a subsequent search warrant. The medical examiner

testified that the girl suffered multiple areas of lacerations with extensive contusions and abrasions of the face and head. She also had a scalp hematoma with frontotemporal cerebral subarachnoid hemorrhage. The official cause of death was massive hemorrhage due to multiple stab wounds of the chest.

The testimony showed that the victim was taken outside and placed in the front seat of Ms. Nestles' blue Hornet, between the Defendant, White, who was driving and the co-Defendant, Dimarino, who was in the passenger's seat.

At this point, the other co-Defendant, Smith, standing next to White told White and Dimarino, "I don't want any witnesses. If you take care of business, don't run a sloppy act." Smith held the title of the Florida regional enforcer for the Outlaws. Dimarino was the Orlando enforcer. Smith then left.

Dimarino testified that this meant to kill the girl. She asked to be taken home but was driven towards a remote area by White. The car was stopped briefly enroute and Dimarino and White exchanged places.

Dimarino drove to an area near Seaworld and stopped the car at a dead end road. Both White and Dimarino took the girl towards a 5' fence. Dimarino climbed over the fence while White held the girl. White passed the girl up over the fence to Dimarino, who held her until White also climbed over. Dimarino threw the girl down and White straddled the girl, drew a knife, leaned over, and commenced to stab the victim fourteen times in the chest and face. He then cut her throat and handed the knife to Dimarino saying "you might as well implicate yourself." Dimarino then cut her throat once and returned the knife to White.

While leaving the area they ran out of gas at the Seaworld parking lot entrance. They were later identified by Seaworld Security guards who finally gave them gas. Dimarino produced a false identification and White was observed with blood on his arm. The time at Seaworld was recorded from 3:22 A.M. to 4:30 A.M.

Fearing discovery, they returned to the body scene, threw the girl back over the fence, and stuffed her body in the trunk.

She was then taken to a desolate area of Orange County where her body was dumped by a dirt road and a railroad track.

They returned to the Suffside clubhouse where White washed off his knife. They picked up Sami Nestle and drove to Dimarino's house on Hillcrest. Enroute they stopped to close the hatch cover of the trunk which was still open. White and Dimarino were observed by a neighbor washing the car early in the morning.

Expert witnesses confirmed the blood found in the car matched that of the victim.

In determining whether the Defendant should be sentenced to death or life imprisonment; the Court is mandated by Section 921.141 (5) Florida Statutes (1977), to apply the facts to certain enumerated "aggravating" circumstances and such "mitigating" circumstances as one applicable in this case. This Court, in reviewing the facts of the case, further considered only those facts and circumstances which were known and made available to the Defendant.

First, the "aggravating" circumstances:

a) The Defendant was not under sentence of imprisonment at the time the crime was committed. Circumstance "a" is not applicable.

b) The Defendant had not been previously convicted of another capital felony or of another felony involving the use of threat of violence to another person. Circumstance "b" is not applicable.

c) In the murder of Gracie Mae Crawford, the Defendant did not create a risk of death to persons other than Gracie Mae Crawford. Circumstance "c" is not applicable.

d) The murder of Gracie Mae Crawford was committed while the Defendant was engaged in the commission of a kidnapping. The evidence is clear that Gracie Mae Crawford was severely beaten to the extent of causing brain damage. Further, she was quite intoxicated. She was "helped" from the kitchen to the car by Richard Dimarino. She asked to be taken home: She was placed between Dimarino and White and against her will, forceably and secretely confined for the purpose of murdering her in a remote area. Circumstance "d" is applicable.

e) The murder of Gracie Mae Crawford was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. Although it may be argued that the crime was committed for the purpose of avoiding or preventing a lawful arrest by hindering law enforcement officers from discovering the commission of an aggravated battery by Smith and his co-defendants and avoiding punishment and further

that the murder was accomplished to eliminate the victim of their crime, the Court has taken the construction of this circumstance most favorable to the defendant and finds that these facts would be more appropriate under circumstance (g) below.

f) The murder was not committed for pecuniary gain. Circumstance "f" is not applicable.

g) The murder of Gracie Mae Crawford was committed to disrupt or hinder the enforcement of laws, i.e., to escape detection and punishment for the crime of aggravated battery. See circumstance (e) above. Circumstance "g" is applicable.

h) The murder was expecially henious, wicked, and cruel. The victim, beaten and intoxicated, was quite helpless and unable to defend herself from the Defendant's conscientious, willful, purposeful, and savage attack. The Defendant repeatedly struck the victim in the chest and face with a knife causing fourteen separate puncture wounds, at least three of which would have alone been fatal. To insure the death of his victim, the Defendant then sliced her throat. She died as a result of planned, methodical, cruel, wanton, malicious, atrocious, conscienceless, pitiless crime unnecessarily tortuous to the victim. Without further elaboration, circumstance "h" is applicable.

Having found that four "aggravating" circumstances exist, it becomes necessary to determine if sufficient "mitigating" circumstances exist to outweigh the "aggravating" circumstances.

a) The Defendant has not previously been convicted of any felonies. Circumstance "a" is mitigating.

b) The Defendant had been drinking but knew what he was doing. There is no evidence that the murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Circumstance "b" is not applicalbe.

c) The victim was not a participant in the Defendant's conduct nor did she consent to the Defendant's acts or actions. Circumstance "c" is not applicable.

d) The evidence shows that the Defendant was one of the primary actors in the murder. Circumstance "d" is not applicable.

e) The evidence shows that the Defendant did not act under the domination of any other person and the evidence does not establish he acted under extreme duress. Circumstance "e" is not applicable.

f) The Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not impaired. His actions clearly showed he knew what he was doing during the time of the murder. Circumstance "f" is not applicable.

g) At the time of the murder, Defendant was 33 years of age. He was old enough to fully appreciate the criminality of his conduct and the evidence shows this awareness throughout. Circumstance "g" is not applicable.

The sentence to be imposed is not to be determined simply by subtracting the number of mitigating circumstances from the number of aggravating circumstances. The sentence to be pronounced must be based on the totality of the evidence, as applied to the enumerated "aggravating" circumstances and such "mitigating" circumstances are applicable. The "aggravating" circumstances have been proven beyond and to the exclusion of every reasonable doubt. One "mitigating" circumstance is present, however, it is not sufficient to outweigh the "aggravating" circumstances.

The majority of the jury has recommended death.

This Court, after much thoughtful consideration with due consideration to the majority recommendation of the jury and recognizing its' solomn responsibility to make the ultimate decision as to whether or not the death penalty should be imposed, concluses, based on the aggravating circumstances far outweighing the mitigating circumstances that the death sentence is the only appropriate penalty.

The Court does concur in the majority recommendation of the jury and finds that the facts require the death penalty.

DONE and ORDERED in Chambers at Orlando, Orange County, Florida thsi 28th day of December, 1978.

Frederick Pfeiffer

FREDERICK PFEIFFER, JUDGE
Criminal Justice Division

Copies:

State Attorney James W. Hart
David Kaplan, Attorney for the Defendant